U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 09 2011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an obstetrician/gynecologist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submitted a personal statement and a transcript. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

On January 24, 2011, this office advised the petitioner of derogatory information. Specifically, the AAO noted discrepancies in the petitioner's employment claims. Most notably, the AAO noted that proceedings before the State Board for Professional Medical Conduct reveal that the petitioner's employment with State University of New York (SUNY) Buffalo ended prior to January 2010, when the petitioner filed a new petition alleging current employment at that hospital. The AAO also noted that the petitioner was not licensed to practice medicine.

The petitioner's response resolves the inconsistencies prior to January 2010. As the petitioner's recent petition postdates the matter before us, we will not reach whether the petitioner's January 2010 claim constitutes misrepresentation. The petitioner's response also confirmed that, as a resident at a public hospital, the petitioner was not required to hold a license. The petitioner did not, however, demonstrate that it is reasonable to expect that he will be able to obtain a medical license in the near future.[1] For the reasons discussed below, the evidence does not support a finding that waiving the alien employment certification process in this matter is in the national interest.

Section 203(b) of the Act states in pertinent part that:

[1] On March 23, 2010, the New York State Board for Professional Medical Conduct determined that the petitioner "is prohibited from further medical licensure in the State of New York." Without evidence to the contrary, we must conclude that this order will likely impact the petitioner's ability to secure licensure in other states as well.

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --

> (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer.
>
> > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a medical degree from the University of Nigeria. A physician is a professional occupation. Being a member of the professions, however, does not entitle the petitioner to classification as a professional if he does not seek to continue working in that profession. *See Matter of Shah,* 17 I&N Dec. 244, 246-47 (Reg'l. Comm'r. 1977). While the petitioner has established that he does not need a medical license to work as a resident at a New York State public hospital, he has not demonstrated that he will be able to continue to work as a physician in the future. Thus, he does not qualify for the classification sought.

Nevertheless, we will also consider whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest. Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors that U.S. Citizenship and Immigration Services (USCIS) must consider when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, the petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. We include the term "prospective" to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The director concluded that the petitioner's occupation is in an area of intrinsic merit, obstetrics and gynecology. As the first consideration only relates to the *proposed* occupation, we will not withdraw that finding. The director next concluded that the proposed benefits of the petitioner's work would not be national in scope. Specifically, the director noted that the petitioner had not demonstrated the significance of his research and had not recently engaged in consulting work. The director then concluded that his work as a physician would not be national in scope. On appeal, the petitioner does not expressly address this conclusion. *NYSDOT,* 22 I&N Dec. at 217, n.3, explains the national scope issue as follows:

> For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

Id.

Significantly, Congress is presumed to be aware of existing administrative and judicial interpretation of statute when it reenacts a statute. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). In this instance, Congress' awareness of *NYSDOT* is a matter not of presumption, but of demonstrable fact. In 1999, Congress amended section 203(b)(2) of the Act in direct response to the 1998 precedent decision. Congress, at that time, could have taken any number of actions to limit, modify, or

completely reverse the precedent decision, such as by applying the waiver to all physicians or general surgeons. Instead, Congress let the decision stand, apart from a limited exception for certain physicians working in shortage areas, as described in section 203(b)(2)(B)(ii) of the Act. As stated above, while the petitioner asserts on appeal that there is "an urgent need for Physicians, particularly OBGYN Physicians, equipped with Basic Science training in this fast emerging and promising Human Reproductive Science Technology," the petitioner does not seek a waiver under section 203(b)(2)(B)(ii) of the Act. Because Congress has made no further statutory changes in the decade since *NYSDOT*, we can presume that Congress has no further objection to the precedent decision.

Applying the above reasoning quoted from *NYSDOT,* 22 I&N Dec. at 217, n.3, to the matter before us, the treatment of patients at a single hospital does not result in benefits that are discernible at the national level. Similarly, training colleagues in procedures developed by others provides benefits that are negligible at the national level. Thus, the only proposed benefits of the petitioner's work that could be national in scope are those resulting from his research.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Id.* at 218.

On appeal, the petitioner asserts that his "specialized training in clinical Human Embryology and Andrology" puts him ahead of other obstetricians and gynecologists in the United States. It cannot suffice, however, to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

In response to the AAO's notice of derogatory information relating to the petitioner's current employment and disciplinary hearings, the petitioner notes that he has requested a waiver of the job offer requirement and, thus, need not demonstrate a current job offer. While a petitioner seeking a waiver of the job offer requirement need not submit an approved alien employment certification or a concrete job offer, the classification is an employment based classification and the petitioner must demonstrate a prospective benefit through future employment. *Id.* at 219. If the petitioner cannot demonstrate eligibility to practice in his occupation, he cannot demonstrate a potential prospective benefit. As discussed above, while the petitioner is correct that he does not need a medical license to work in a public hospital as a resident, he has not demonstrated that he will be able to secure a medical license in New York State or any other state.[2]

[2] As stated above, the New York State Board for Professional Medical Conduct determined that the petitioner "is prohibited from further medical licensure in the State of New York."

In his response, the petitioner asserts that his disciplinary proceeding is still pending. Specifically, he offers his self-serving statement that the proceedings resulted from retaliatory actions against him for exposing his own unfair treatment at [redacted] and submits evidence that he has sued [redacted] The petitioner has not established how a lawsuit against his former employer will impact the New York State Board of Professional Medical Conduct's final order.[3] This appeal proceeding now before the AAO is not the appropriate forum to challenge the charges brought against the petitioner before the New York State Board of Professional Medical Conduct.

It is not in the national interest to waive the alien employment certification process for a physician who, due to professional disciplinary hearings, is unable to demonstrate that it is likely he will be able to continue to practice in the proposed occupation. For that reason alone, the petition must be denied. Nevertheless, in the interest of thoroughness, we will also consider the petitioner's past record.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner submitted evidence of his education and United States Medical Licensing Examination results. Even assuming the petitioner is capable of obtaining a medical license, qualifications to work in a profession are not a basis to waive the alien employment certification process. *Id.* at 218.

The record establishes that the petitioner was admitted as a fellow of the Council of the West African College of Surgeons in 1992 based on examination results; as a fellow of the International College of Surgeons, Nigeria Section, in 1998; as a member of Advancing Minimally Invasive Gynecology Worldwide (AAGL) in 2005; and as a member of the Society of Gynaecology & Obstetrics of Nigeria in 1994. Professional memberships are merely one type of evidence that can be submitted to establish eligibility as an alien of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(E). Because exceptional ability, by itself, does not justify a waiver of the alien employment certification requirement, arguments hinging on professional memberships, while relevant, are not dispositive to the matter at hand. *Id.* at 222. The record contains no evidence that these fellowships and memberships are indicative of or consistent with the petitioner's influence in the field.

[3] On March 23, 2010, the Board reached a unanimous conclusion barring the petitioner from licensure in New York State based on the petitioner's failure to respond to the charges or submit to a psychiatric evaluation.

The petitioner has documented most of his claimed experience beginning in 1992. As with professional memberships, ten or more years of experience are one type of evidence that can be submitted to establish exceptional ability. Because exceptional ability, by itself, does not justify a waiver of the alien employment certification requirement, arguments hinging on the degree of experience required for the profession, while relevant, are not dispositive to the matter at hand. *Id.* at 222.

The petitioner submitted an April 7, 2006 letter confirming his "nomination" as "an" International Health Professional of the Year in 2006 by the International Biographical Centre (IBC). The letter indicates that the IBC is a publisher of biographical dictionaries. The petitioner submitted a second letter dated July 14, 2006 confirming his nomination for the Top 100 Health Professionals in 2006. This letter suggests that the petitioner is "eligible" for the commemorative items available, such as a medal that the petitioner must purchase, albeit at a "discount." We note that the petitioner filed a previous petition seeking classification as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Act, LIN-07-222-53726. This previous petition is part of the record of proceeding before us and contains not only letters from IBC but other materials purportedly documenting IBC's significance. The director denied that petition and the petitioner filed an appeal. In a decision, dated August 10, 2009, the AAO advised the petitioner that he had not established that IBC is anything more than a for-profit vanity publication that sells awards.[4] Thus, the petitioner was on notice that the evidence did not elevate IBC above a vanity press. Despite this notice, in the current matter the petitioner submits only the letters from IBC without any independent objective evidence about the significance of IBC. The director, in denying the instant petition, concluded that IBC appears to be a vanity press.

On appeal, the petitioner states:

> [T]he recent professional performance recognition accorded me by the universally well known and respected International Biographic Centre, Cambridge, England, unfortunately was described as a vanity press service by the director. There are institutions all over the world that have established name recognition and International Biographic Center in Cambridge England is one of them. I thought the Director, if in doubt about my recognition, would have checked with that Organization rather than resorting to the unfortunate derogatory remark which, is an error of commission.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). It is the petitioner's

[4] The AAO noted that the materials submitted from *Wikipedia* are not a reliable source. *See Lamilem Badasa v. Michael Mukasey,* 540 F.3d 909 (8th Cir. 2008). The AAO further noted that even if the AAO were to consider the *Wikipedia* materials submitted by the petitioner, those materials could only support a conclusion that IBC is a vanity press.

burden to establish the significance of IBC. Moreover, the director was not obliged to accept IBC's self-serving promotional claims.[5] While the petitioner repeatedly uses the word "Cambridge" on appeal, the record contains no evidence that IBC is in any way affiliated with Cambridge University. Ultimately, we concur with the director that the offer to include the petitioner's biography in a large biographic dictionary and sell the petitioner commemorative awards is consistent with a vanity press.

The petitioner attended a conference in 1996 and presented a paper in October 1997. The petitioner also submitted case reports published in *Tropical Doctor* in 1997 and the *Journal of Obstetrics and Gynaecology* in 1998. While presentation and publication demonstrates dissemination of the petitioner's work, it cannot demonstrate the work's ultimate influence. The record contains no citations or other evidence that this work has influenced the field of obstetrics and gynecology. Moreover, the record lacks letters from independent experts or even the petitioner's colleagues explaining the significance of this research. The petitioner's own self-serving affirmations of the significance of his research are insufficient. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California,* I&N Dec. at 190).

In response to the director's request for additional evidence, the petitioner submitted a December 19, 2007 letter from the Eastern Virginia Medical School (EVMS) admitting the petitioner to an on-line Master's program in Clinical Embryology and Andrology beginning in May 2008. The petitioner also submitted a Thesis Presentations Schedule reflecting that petitioner presented his thesis at EVMS on May 20, 2009, several months after filing the petition. The petitioner also submitted his unpublished thesis. In response to the director's request for additional evidence and again on appeal, the petitioner provides a self-serving statement regarding the significance of his thesis research. The petitioner must establish his eligibility as of the date of filing. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). Even if we consider this evidence, however, the petitioner has not demonstrated that the petitioner published this work or that it has garnered any interest in the field, as might be demonstrated through, for example, citations. The petitioner did not even submit letters from independent experts or even close colleagues explaining how the petitioner's work is already influencing the field. As stated above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California,* I&N Dec. at 190).

Finally, the petitioner submitted a November 13, 1992 letter from the University of Nigeria Teaching Hospital appointing the petitioner as an "honorary consultant," where the petitioner was already employed as a lecturer. The letter states: "The duties assigned to the appointment shall be such as may be assigned to you by the Hospital Management Board for the purpose of providing medical and specialist services as a member of the Consultant Medical staff of the Hospital." This letter does not

[5] *See Braga v. Poulos,* No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media).

establish how this appointment demonstrates the petitioner's track record of success with some degree of influence on the field as a whole.

Ultimately, even if we ignore that the petitioner has not established that he will be able to continue to work in the occupation listed on the petition, the evidence does not warrant a waiver of the alien employment certification process. The petitioner has established his experience as a practicing physician, an occupation that inherently provides local benefits. Regardless, experience alone does not warrant a waiver of the alien employment certification process. The petitioner has also established that he is pursuing a Master's degree involving an original thesis. While the petitioner asserts that the knowledge gained through this education will set him apart from other obstetricians and gynecologists, education and training are factors that can be enumerated on an application for alien employment certification. Thus, they do not warrant a waiver of that application. The petitioner has submitted case studies and presentations but has not established their influence in the field upon dissemination. The petitioner has also failed to provide letters of support from independent experts or even colleagues confirming the significance of the petitioner's research. As such, we concur with the director's determination that the petitioner has not established his eligibility for the benefit sought and find that the Texas Service Center's subsequent approval of a petition seeking the same benefit based on the same evidence was in gross error.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.